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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 299

UNITED STATES OF AMERICA, PETITIONER

v.

GERLACH LIVE STOCK COMPANY, A CORPORATION

No. 300

UNITED STATES OF AMERICA, PETITIONER

v.

J. SHELDON POTTER

No. 301

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN ERRECA

No. 302

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES J. STEVINSON, A CORPORATION

No. 303

UNITED STATES OF AMERICA, PETITIONER

v.

ARCHIBALD J. STEVINSON

No. 304

UNITED STATES OF AMERICA, PETITIONER

v.

3-H SECURITIES COMPANY

REPLY BRIEF FOR THE UNITED STATES

STATEMENT

Briefs have been filed by two groups of *amici curiae* which raise some points which may require discussion. A number of western states form one

group, while the other is composed of a number of plaintiffs in actions in the Court of Claims which are said to be similar to the cases before this Court. When necessary to differentiate between them, they will be designated hereinafter as "The States" or "The Claimants", respectively.

The points raised are:

1. That the Act of July 26, 1866, c. 262, 14 Stat. 251, 253, is a recognition by the United States of the rights of respondents here. (States' Br., p. 6; Claimants' Br., p. 39)

2. That Section 8 of the Reclamation Act of 1902 constitutes such a recognition. (Claimants' Br., p. 18)

3. That water rights in the navigable streams of the west are not subject to the navigation servitude which the United States has over the navigable streams of the east. (Claimants' Br., p. 36)

4. That legislation dealing with the Central Valley Project has created an obligation to pay respondents by ratification of a course of conduct followed by the Secretary of the Interior. (Claimants' Br., p. 27)

5. That the flood control features of Friant Dam produce relatively "trivial" benefits as compared to the benefits of the irrigation operations and as compared to the cost of the dam and some of its

related works and so, it is argued, the damages to respondents should be regarded as a taking for irrigation alone. (Claimants' Br., p. 46).

ARGUMENT

I

Section 9 of the Act of July 26, 1866, c. 262, 14 Stat. 251, 253, Does Not Aid Respondents

The provisions of that Act upon which the *amici curiae* rely are:

> "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed."

The effect of that Act was to establish the doctrine of prior appropriation of waters running through the public domain. *Atchison* v. *Peterson*, 20 Wall. 507, 513. Its purpose was to abrogate the riparian doctrine. *Ibid.* 512. It was based on the principle that "he who first connects his own labor [to divert water] with property thus situated [i.e., removed from the stream] and open to general

exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor." *Ibid.* 512.

Neither the language nor the purpose of the statute nor the principle embodied in it have any application here.

The language deals with rights founded on "priority of possession". The claim of respondents is for rights based solely on riparian location. The purpose of the statute was to abrogate the doctrine upon which such claims are founded.[1] The principle of natural justice in securing one in the fruits of his labor has no application since the claim of respondents (except in the case of Erreca) is for the loss of natural flooding and not for the loss of any benefit which their labors have created. Even in Erreca's case, he is claiming a riparian right, not an appropriative right, so a statute establishing the appropriative doctrine cannot be regarded as recognizing or confirming a claim of riparian right.

II

Section 8 of the Reclamation Act Does Not Support Respondents' Claims

The Claimants argue in their brief (p. 18) that Section 8 of the Reclamation Act should not be construed as urged in the Government's main brief

[1] The Government does not contend that the statute in question diminished respondents' rights since their titles are all based upon patents antedating the statute.

(pp. 66-71). In opposition, they urge various statements made in the congressional debates on the bill and they argue that as a matter of administrative practice "The Bureau of Reclamation has invariably recognized" water rights in navigable streams.

As pointed out in our main brief (p. 68), two reports of the House Committee on Public Lands make the same statement that Section 8 recognized state control over waters of non-navigable streams. It is true that one report dealt with the House bill, which was enacted into law, and the other dealt with a similar, though not identical provision, in a Senate bill, which did not pass. Claimants say: "The Senate Committee did not repeat the error of the House Committee. See S. Rept. No. 254, 57th Cong., 1st sess." The cited Senate report dealt with the Senate bill, which was not enacted, and is silent on the question whether Section 8 was intended to apply to private rights in navigable waters. There is no suggestion in the Senate report that it was so intended.

The parts of the debate on the bill cited by Claimants have nothing to do with the meaning of Section 8. Instead, with one exception, they are directed to the question whether the bill would authorize the Secretary of the Interior to carry out reclamation projects on navigable streams. The one exception, the statement of Mr. Sutherland, of Utah (35 Cong. Rec. 6770), does not touch

the distinction between navigable and non-navigable waterways.

In their brief, p. 25, Claimants assert that "The Bureau of Reclamation has invariably recognized" water rights in navigable streams. The statement is not documented and appears to be erroneous. Thus, in the argument for Arizona in *Arizona* v. *California,* 283 U. S. 423, 439, it was contended that "Defendant Wilbur threatens to invade the quasi-sovereign rights of Arizona by building a dam within its jurisdiction and diverting and using water from its jurisdiction in violation of its laws," and (p. 447) it was argued "The State in its sovereign capacity owns the water in the river, the bed of the river, and its banks to high water mark. This is a full proprietary ownership." Thus, it was at least contended that the Secretary of the Interior was violating both the laws and the property rights of the state in the water. The Court did not decide the validity of either contention, so the decision lends no support to either side in connection with the precise point under consideration here. It is to be noted, however, that the Secretary was there acting under a statutory authorization in terms which appear to have been copied into the statute authorizing the Central Valley Project.

III

Water Rights, Such as They Are, in the Navigable Streams of the West, Are Subject to the Same Powers of the Federal Government as Are Rights in the Eastern Streams

Claimants urge in their brief (p. 36) that respondents cannot be deprived of their claimed rights without compensation even in aid of navigation. Their argument in this connection seems to be founded on the premise that by statutes such as the Act of July 26, 1866, (discussed supra, p.), and the Desert Land Act of 1877, (19 Stat. 377), Congress has surrendered, at least in part, its powers to improve navigation in the west. The argument seems to be that the several statutes show a congressional policy to protect water rights for irrigation even as against the needs of navigation.

In 1877, the year in which the Desert Land Act was passed, Congress adopted the first project for the improvement of navigation of the San Joaquin. See Senate Committee on Rivers and Harbors Report No. 1686, 55th Cong., 3rd Sess., p. 282. Congress has continued to appropriate for the improvement of navigation on the San Joaquin ever since. Section 10 of the Rivers and Harbors Act of 1890, c. 907, 26 Stat. 426, 454, forbade obstruction of the navigable capacity of "any waters, in respect of which the United States has jurisdiction." In *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, this Court held that statute was applica-

ble to the Rio Grande River in New Mexico. By the Act of March 1, 1893, c. 183, 27 Stat. 507, 33 U. S. C. 661 et seq., Congress created the California Debris Commission "to mature and adopt such plan or plans * * * as will improve the navigability of all the rivers comprising [the Sacramento and San Joaquin River systems in the State of California], deepen their channels, and protect their banks." That commission is still functioning. In *United States* v. *Arizona,* 295 U. S. 174, this Court held that Section 9 of the Act of March 3, 1899, c. 425, 30 Stat. 1151, 33 U. S. C. sec. 401, forbidding obstructions in navigable waterways, applied to works in the Colorado River even when their construction was undertaken by the Secretary of the Interior. Surely, such a course of legislation does not indicate any congressional intent to relinquish the rights of the United States over its western rivers.

While the awards in these cases were apparently based on loss of natural flooding, the most numerous of the rights asserted in western streams are rights to divert water. The argument advanced by Claimants would, if accepted, put diversion rights in the protected class.

It can hardly be said that Congress has adopted a policy of recognizing vested rights to divert water from a navigable stream, when such diversion impairs navigability (see H. Doc. 395, 73rd Cong., 2nd sess., p. 327), while at the same time Congress has appropriated large sums for the improvement

of navigation, made it a crime to divert water from a navigable stream without permission (cf. *Sanitary District* v. *United States*, 266 U. S. 405), and created a commission to function exclusively in the preservation of the navigability of the very river in question here. This action by Congress indicates that it does not regard its powers over navigable rivers in the west as any different from those over such rivers elsewhere.

IV

There Has Been No Assumption of an Obligation by Ratification

Claimants contend (Br., pp. 27-34) that by the legislation dealing with the Central Valley Project the Congress has created a statutory obligation to pay respondents. The argument, in sum, is that from the original authorization down to the present the Bureau of Reclamation has asked and received appropriations for the acquisition of water rights; Congress has been informed of the purchase of water rights on the San Joaquin; repeated appropriation for that purpose constitutes ratification of the administrative construction of the Reclamation Act and "a ratification of the action of the Secretary as the agent of Congress in the administration of the act." Reliance is placed upon *Brooks* v. *Dewar*, 313 U. S. 354, and *Swigart* v. *Baker*, 229 U. S. 187. It is submitted that neither the facts nor the authorities cited lead to the result which is urged.

In the first place, the action of the Secretary in making payments and the action of Congress in making appropriations for that purpose is entirely consistent with the view (discussed in our main brief, pp. 63-65) that it may be desirable to make payments even though there is no legal obligation to do so. Thus, one reason assigned in 1940 by the Commissioner of Reclamation for the purchase of claimed water rights of Miller & Lux in the San Joaquin was the fear that if the Government proceeded in disregard of the claims of water rights, an injunction might be secured by "large" and "influential" interests which would delay work for years. The Commissioner expressed the view that conditions would not permit delay, so negotiation was made necessary. Hearings, H. Comm. on Appropriations, 76th Cong., Vol. 8, pt. 1, pp. 429-430.

In the second place, we have been unable to find, and claimants do not cite, any suggestion to the Congress that the purpose for which appropriations were sought was to bind the United States to satisfy claims which had no legal basis. It is true that Congress was informed, as shown above, that the money would be used in the settlement of disputes about water rights where to do so would advance other interests of the Government, but that is quite different from obligating the United States to pay claims.

It is elementary that an essential element of ratification is full knowledge. Thus, in *Brooks* v. *Dewar*, 313 U. S. 354, where this Court held that

other action by the Secretary had been ratified by Congress, it pointed out that (p. 360) "The information in the possession of Congress was plentiful and from various sources." But in this case the information before Congress as to the existence of an obligation to pay is, at best, ambiguous.

Claimants point to the long period of time covered by the series of appropriation acts and argue that this should be given weight. But at least since October, 1944, when the *Gerlach* case was decided on demurrer, and perhaps since October, 1943, when that case was filed, the uncertainties of litigation have made it necessary for the Bureau of Reclamation to make budgetary provision for water rights. And, since the decision on demurrer did not rest on the ground of an assumed statutory liability, subsequent action by the Congress cannot be construed as a legislative ratification of a judicial holding to that effect.

V

The Use of Friant Dam for Irrigation Is Subordinate to Its Use for Flood Control

Claimants contend in their brief (p. 46) that flood control by Friant Dam is an incident to irrigation and that any flood control benefits to commerce are both incidental and trivial. They argue to that conclusion by measuring costs against benefits and reason that, on the figures they state, the benefits to commerce are disproportionately small. As made, the argument is unsound but so are the facts upon which it is based.

For their facts as to flood damage and flood control benefits they cite the Report of the Chief of Engineers on San Joaquin River, H. Comm. on Flood Control, Doc. No. 2, 78th Cong., 2nd Sess. That report shows an average annual flood damage estimated at $1,460,000 (Table 20, p. 32), apart from the "intangible damages" of "losses resulting from the interruption of utility services including domestic, industrial, electrical power, telephones and railroads" and "loss to the traveling public", which the report says are not susceptible of valuation. Of this money total, they say only about $110,000 represents damage done to "roads, bridges, buildings, equipment and utilities", citing the same report at page 31. But the table on that page shows flood damage to such installations in the San Joaquin Valley for the year 1937-38 at $373,810 (compare Table 18, p. 29, with Table 19, p. 31) and, in addition, shows flood losses of well over $1,000,000 through "damage to levees and structures" and "expenditures fighting floods." (p. 32.) Claimants do not explain how they reached the figure of $110,000[2] or why damage to levees and the intangible losses to commerce should be ignored.

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[2] In the year covered by the report, tangible flood damage was approximately three times the annual average. Perhaps claimants attempted to reach the average of the item which they discuss by taking one-third of the damage reported. Such method of computation is inadmissible since damages to particular installations will not follow the average. Thus, installations close to the river, such as levees, will suffer more frequently and more heavily from lesser floods than will installations farther removed.

Against their figures on benefits Claimants match a total estimated cost of $157,000,000 for the Central Valley Project on the San Joaquin. Admittedly, the larger part of the expenditures in that part of the project are for irrigation, but that has no bearing on the relationship of the purposes. It may be that flood control alone would not have justified the expenditure, but the fact that flood control is joined with other purposes does not strip the project of its flood control character.

It is submitted that the true test for determining the primary purpose of the dam is not a measuring of benefits against costs but, instead, involves the answer to the question of which purpose must yield when there is conflict. Congress has commanded that the dam be operated for flood control before irrigation (50 Stat. 844, 850), and the Secretary of the Interior has recognized that flood control "has a prior claim upon the operation of the reservoirs" and that "it is mandatory that preference in operating the reservoirs be given to navigation and flood control." H. Doc. No. 146, 80th Cong., 1st Sess., pp. 28, 29. For that reason, the space in Millerton Lake (Friant Reservoir) reserved for flood control is an annual mean of 67,800 acre-feet and for extreme floods will reach as high as 390,000 acre-feet, or nearly four-fifths of total capacity. Central Valley Project Studies, Allocation of Costs Problems 8-9, p. 66, Department of the Interior, 1947.

Moreover, since respondents' lands were benefited only by "the peak of the spring floods" (Finding 28, R. 87), it is apparent that it is the flood control function of Friant Dam which causes respondents' loss. Since the control of floods is clearly within the Government's servitude over the river for commerce, the damage is *damnum absque injuria* and respondents cannot be heard to complain of other operations of the dam which do them no harm.

Respectfully submitted.

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